SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 295

COLONEL HENRY S. ROBERTSON, PRESIDENT, ARMY REVIEW BOARD,

Petitioner,

vs.

ROBERT H. CHAMBERS

BRIEF IN OPPOSITION

H. RUSSELL BISHOP,
Counsel for Respondent.

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Opinions Below

The opinion of United States District Court for the District of Columbia is not reported. It is in the record at page 19. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 22-28) is reported at 183 F. (2d) 144.

Jurisdiction

It is believed this Court has jurisdiction under 28 U. S. C. 1254(i).

Statement

The statement contained in Petitioner's Brief is a fair summary of the proceeding to the time of filing the petition

and, therefore, no additional statement is made by respondent.

Question Presented

Where an enabling statute creating an administrative board limits by specific description the documentary evidence which shall constitute the record before such board, and the head of such board has disregarded the limitation by adding documents of an entirely different class to such record, and refuses to remove such documents upon the request of the party entitled to be heard, may the party entitled to be heard apply for and obtain a mandatory order from the court compelling the removal of said document?

Statute Involved

The statute involved is Section 302 of the Servicemen's Readjustment Act of 1944 (pars. (a) and (b) (38 U. S. C. 693i (a) and (b)). The statute reads as follows:

> "(a) The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer retired or released from active service, without pay, for physical disability pursuant to the decision of a retiring board, board of medical survey, or disposition board, the findings and decisions of such board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit, and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under

this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of any such retiring board, board of medical survey, or disposition board shall be transmitted to the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Treasury, as the case may be, and shall be laid by him before the President for his approval or disapproval and orders in the case.

"(b) No request for review under this section shall be valid unless filed within fifteen years after the date of retirement for disability or after (June 22, 1944), whichever is the later."

ARGUMENT

I

The Power of the Army Review Board to Consider Veterans' Administration Medical Reports or Any Other Evidence Is Governed by the Statute.

Petitioner's Argument, Point 1, commencing on page 8 of his brief completely overlooks the fact that this was a statute which not only conferred a right or privilege, but provided in great detail the procedure which should be followed by the Board in reviewing the case of Respondent or any one similarly situated.

The statute (38 U. S. C. 693i (a) and (b)), while short, is one that was obviously drawn with scrupulous care. The greater part of the statute consists of procedural matters. Thus it provides that a board of five members shall have two medical officers as members; that the review shall be based upon all the available service records relating to the officer requesting review, and such other evidence as may be presented by the officer; that witnesses may present testimony

in person or by affidavit; that the officer may appear in person or by counsel; that the reviewing board shall have the same powers as exercised by or vested in the board whose findings and decisions are being reviewed; that the decision of the reviewing board shall be transmitted to the Secretary of the Army and be laid by him before the President for his approval or disapproval and orders in the case.

Petitioner's argument completely overlooks the fact that this is not the type of statute which provides for administrative review and hearing and the statute leaves it to the administrative body to determine what method of review will be followed. Many of the Petitioner's arguments would be valid if they applied to such a statute, with provisions for Court review, but Petitioner's argument ignores the fact that the Army Review Board was created by a statute which clearly sets forth the procedure which is to be followed. General propositions regarding administrative hearings can have no application where a statute such as this is involved. It is elementary that where the legislature creates an administrative body and states what the procedure is to be before that body, the administrator can neither enlarge nor limit the procedure, but must follow the dictates of the statute. *Morgan* v. *United States*, 298 U. S. 468.

II

Construction of the Statute

A. *The purpose and meaning of the statute.*

Petitioner states on page 11 of his brief:

> "The Court, in other words, inserted the word 'only' in the sentence, so that it read the statute as declaring that 'such review shall be based *only* upon' the service records and the officer's evidence. Since the Veterans'

Administration medical reports were assumed not to be service records (3) and obviously did not fall within the second category, their consideration by the Review Board would, in the opinion of the court below, violate Section 302."

To this is added the following footnote:

"It is very questionable whether the assumption that the Veterans' Administration records were not 'available service records' within the meaning of Section 302 is correct."

What the Court actually said is found on page 27 of the Record:

"Each of the parties has stated a contention which, if true, would rule this issue his way. The crux is whether the language of the section relied on by appellee modifies or affects that relied on by appellant. If this presented a doubtful situation where the language urged by appellant did not plainly carry and require the meaning he asserts, we would hesitate to uphold this remedy (United States *ex rel.* v. Interstate Commerce Commission, 294 U. S. 50, 61; Interstate Commerce Commission v. New York, N. H. & H. R. Co., 287 U. S. 178, 203-204). However, the requirement of the section is clear and unequivocal. The vital expression is that 'such review *shall be based upon* . . .' (emphasis added). These words are words of exclusion of all evidence not specified in that sentence. The language urged by the appellee does not qualify this requirement. In fact, if it affected this requirement in any way, it would be to destroy it entirely. This is true because, if the Board can consider any evidence other than the service records and such as the officer might present, such action would clearly allow the Board to *base* its decision in whole or part upon this additional proof. 'No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall,

> if possible, be accorded to every word. . . .' Market Co. v. Hoffman, 101 U. S. 112, 115' (*Ex Parte* The Public National Bank of New York, 278 U. S. 101, 104). The general language emphasized by appellee can and does cover many other matters of practice and procedure. The two statutory provisions must and can be construed so that both may be preserved. Congress never intended to destroy the plainly expressed required evidentiary basis for decision by the Board."

To dispose of the footnote first, it should be pointed out that the ruling of the Court that "service records" does not comprehend Veterans' Administration records is based on no mere assumption. The Court states in its opinion (R. 24-25):

> "The fact situation is undisputed, being admitted by the motion to dismiss and, apparently, conceded otherwise. This fact is that the Veterans' Administration reports, made after discharge of appellant, are not 'service records relating to' appellant."

In ruling as it did the Court of Appeals added no words to the statute. When a provision of a statute states that a "review shall be based upon" a certain record, it is tantamount to saying that "the record shall consist of certain specified evidence." Whatever disposition this Court makes of the petition herein, its order granting or denying the writ will be "based upon" the transcript of the record. So the statute here provides that the Army Review Board in disposing of a case before it shall review such case and that "such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer." This, Respondent contends, sets the bounds of the record which the Review Board may consider and those words were used to accomplish that purpose.

Petitioner states that this limitation may unduly restrain the Board in its deliberations and precludes intelligent review and fairness of decision. Conceding, *arguendo*, that this may be true, it is no concern of the Board or of this Court. Certainly nothing in the jurisprudence of this Court is more firmly established than that when the Congress enacts legislation which is fairly within its powers the Courts will not concern themselves with the wisdom of the legislation. *De Zon* v. *American President Lines*, 318 U. S. 660; *Markham* v. *Cabell*, 326 U. S. 404; *Billings* v. *Truesdell*, 321 U. S. 542.

If, as petitioner contends, the statute as written hamstrings the Board in its deliberations, its remedy is to apply to the Congress for an amendment, not to adopt regulations clearly in opposition to the statute.

Careful reading of the statute will show that it is not inexpertly drawn, crippling the Board in carrying out its duties.

Initially it should be borne in mind that this statute, instead of providing for a *de novo* proceeding, provides for a review—a review of the findings and decisions of the retiring board which had adjudicated the case of the officer seeking review. Instead of providing for a permanent board which should review all cases, the statute provided for a separate review board for each case. It is thus that retiring boards are created, a board being appointed to hear and decide the case of each officer ordered before it for the purpose of inquiring into the subject of whether or not he should be retired, discharged or retained in active service.

The statute insofar as the Department of the Army is concerned was enacted for the purpose of enabling all officers who had been retired or released from active service without pay, pursuant to the decision of an Army Retiring Board, to a review of the findings and decision of the retiring board

which had adjudicated his case. The reason for restricting the evidence to the service records of the officer is obvious. The Disability Review Board is set up for the purposes of determining whether or not the action of the retiring board should be sustained or reversed. The board of review in order to function within the intent of the statute must therefore place itself as nearly as possible in the position of the retiring board whose action it is to review. This can only be accomplished by restricting the record to those facts which the retiring board had before it, in other words, to the service records of the officer which would necessarily include the proceedings of the retiring board, and "such other evidence as may be presented by such officer," which he may present for the purpose of showing that the action of the retiring board was erroneous.

It is submitted therefore that the decision of the Court of Appeals and its construction of the statute is sound and that in accordance with the oft-repeated rulings of this Court, the wisdom of the statute is not open for the Court's consideration.

B. *The right to examination of the Veterans' Administration reports.*

Under this subheading commencing on page 12 of his brief petitioner pitches his argument on the theme of fairness. It is argued that since Respondent could and did inspect the Veterans' Administration reports and was thus granted an opportunity to "refute, explain, or show possible inaccuracies," in such reports that "fairness to Respondent does not require exclusion of the reports from consideration by the Review Board."

Respondent does not believe that there is any question of "fairness" in this case unless that term be used synonymously with justice. If so, then the question is whether or not Respondent should be compelled to meet and refute

evidence which by the clear provisions of the statute the Review Board has no power to consider. The answer seems so clearly to be that he should not be so compelled, that to argue that this is the correct answer is to belabor the obvious.

C. *Consistent Administrative Construction of the Act.*

Under this heading, commencing on page 13, the Petitioner quotes statistics which are not of record, attempting to show that the Review Board has consistently construed the statute to permit the inclusion of Veterans' Administration reports in the record before it. In addition to being dehors the record, there is no statement as to whether this practice was ever challenged.

Petitioner made the same argument and quoted the same statistics in the Court below, and that Court disposed of it as follows:

> "As to the second, a short answer would be that the record here is barren of evidence of any long continued and much used administrative practice. However, even accepting the factual basis of long administrative action (as stated in the rebuttal brief), this simply brings into play the rule that such practice should not be overturned unless a different practice is plainly required by the statute. Whether there is here such plain requirement will be determined hereinafter."

The plain words of the statute are at variance with the alleged consistent administrative practice which should, therefore, be set aside. *Norwegian Nitrogen Products Company* v. *United States*, 288 U. S. 294; *Alaska S. S. Company* v. *United States*, 290 U. S. 256.

III

Mandamus Is the Appropriate Remedy

Petitioner states that the decision of the Court of Appeals does violence to the firmly established rule that decisions of

administrative officers involving the exercise of discretion, when not unreasonable or plainly wrong, will not be set aside by an order in the nature of mandamus, citing authorities on page 15 of his brief. Respondent agrees that there is such a rule amply supported by the authorities. Respondent further agrees that "where the duty . . . depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which can not be controlled by mandamus."

It is equally well established that where there is nothing to construe a statute requires no construction, and that an administrative officer can not remove himself from the orbit of an order in the nature of mandamus upon the pretext that he must construe a plain, unambiguous statute. The result which could be obtained by permitting the use of such a stratagem is flatly stated by this Court in *Roberts v. U. S. ex rel. Valentine*, 176 U. S. 211 at page 231, as follows:

> "Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must, therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer.

> Unless this be so the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

This case turns upon the question of the meaning of the term "service records" and Respondent has contended all along that the meaning of this term is so well understood by military men that there is no question as to whether or not Veterans' Administration reports are included within that term. No one has seriously contended that such reports were included in the term "service records," but the attitude of the Board has been—they will be included nevertheless. In so ruling and adhering to this ruling the Board has consistently violated the Act; has refused to perform a ministerial duty in refusing to remove said reports, and, therefore, mandamus is the proper remedy to obtain their removal.

IV

Insofar as He Was Required to Do So, Respondent Exhausted His Administrative Remedies

On page 16 of his brief Petitioner argues as he did below that Respondent failed to exhaust his administrative remedies, and therefore, the action was premature. In sup-

port of this contention Petitioner cites: *Myers, et al* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Macauley* v. *Waterson S. S. Corp.*, 327 U. S. 540, 543, 545; *Federal Power Commission* v. *Arkansas Power Co.*, 330 U. S. 802; *Federal Power Commission* v. *Edison Co.*, 304 U. S. 375; *S. E. C.* v. *Otis and Co.*, 338 U. S. 843.

Each of the cases cited deals with a situation where court review was available. Since there is no provision for court review in this statute, the cited cases are not in point.

Furthermore, it can not be overemphasized that the decision of the Court of Appeals in no way disposes of or attempted to dispose of the merits of the case, which is left, where it properly belongs, with the Board. Respondent requested removal of the Veterans' Administration reports; upon refusal of this request he asked for reconsideration and this was refused. He had, therefore, exhausted all administrative remedies available to him and had no choice but to seek court action. It is submitted that he was not required by the exhaustion rule to submit to a hearing based on a record not in accordance with the statute.

Conclusion

The decision of the Court of Appeals is correct. It does not jeopardize decisions previously rendered by the Review Board. It is not in conflict with decisions of this Court concerning mandamus or the exhaustion of administrative remedies. The case is not sufficiently important to justify the issuance of the writ.

H. Russell Bishop,
Counsel for Respondent.

November 6, 1950.